UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden, Respondent-Appellant, vs. WILLIE WADE, JR., Petitioner-Appellee.	No. 22040

APPELLANT'S OPENING BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

KARL S. MAYER
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1851

Attorneys for Appellant

TOPICAL INDEX

TABLE OF CASES

TEXTS, STATUTES & AUTHORITIES

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JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California, granting appellee's petition for a writ of habeas corpus and ordering his discharge from custody. The order of release is without prejudice to the state to apply to have set it aside in the event a free transcript of trial is provided to appellee.

Proceedings in the State Courts.

On November 1, 1960, appellee, Willie Wade, Jr., petitioner below, and his codefendant, were sentenced in the Superior Court for the County of Los Angeles to life imprisonment on their conviction of violation of California Penal Code section 187 (first degree murder) (CT 38).

On August 17, 1961, the California Court of Appeal, Second Appellate District, in case No. 7946 affirmed appellee's conviction of violation of Penal Code section 187.

The exhibits attached to the petition for habeas corpus indicate that appellee has made several requests for a free transcript of the proceedings at trial which resulted in his conviction of murder. Thus, in April 1966, appellee requested his appellate counsel to send

the transcript. His counsel replied that he did not have the transcript because the one used to prepare and prosecute the appeal had been borrowed from the California Attorney General and returned after the appeal (CT 21).[1/] In May 1966, the Court of Appeal advised appellee that his request for the court to furnish him a free transcript could not be complied with because the court had only the original record and no method of duplication (CT 24). In response to another request, the California Supreme Court advised appellee that requests for the transcript should be directed to the Court of Appeal which handled his appeal (CT 28). Appellee's subsequent request of the Court of Appeal was declined with the advice that the court would make available its copy for copying at appellee's expense (CT 29). In October 1966, the trial court advised appellee that he could obtain his transcript at his expense from the court reporters and then listed the reporters at his trial (CT 30).

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1. California law provides that multiple appellants in a non-death case share a single copy of the trial record. Apparently appellee's codefendant has retained this copy. To facilitate the appeal the California Attorney General accommodated appellee's appellate counsel by loaning him another copy of the trial record for use on appeal.

This procedure is discussed more fully in the argument, p. 9, infra.

Proceedings in the Federal Court.

On February 16, 1967, appellee filed, in forma pauperis with permission of the court (CT 1), a petition for a writ of habeas corpus (CT 2-30). On the same date the District Court issued an order to show cause (CT 31). Appellant, respondent below, filed a return to the order to show cause on February 24, 1967 (CT 32-38). On March 22, 1967, appellee, in propria persona, filed a traverse to the return to the order to show cause (CT 40-45, 46-51). On June 5, 1967, the District Court granted the petition for a writ of habeas corpus (CT 52-54). The court ordered appellee discharged from custody but stayed execution of the order for a period of ten days and also specified that the order was without prejudice to the state to apply to have it set aside in the event the transcripts are provided to appellee.

On June 15, 1967, the District Court stayed execution of the judgment pending the timely filing of a notice of appeal by respondent and pending the determination of such appeal (CT 57), issued a certificate of probable cause (CT 62), and appellant filed a notice of appeal (CT 55).

SUMMARY OF APPELLANT'S ARGUMENT

This appeal is taken upon the grounds set forth in the Statement of Points filed in this Court on July 28, 1967. It is appellant's contention that one in state custody has no federal right to be provided at state expense a transcript of his trial to be used for the purpose of discovering a flaw which may be grounds for habeas corpus or for commencing any other court action which collaterally attacks the validity of the presumptively valid judgment under which he is in custody.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY HELD THAT A STATE PRISONER IS ENTITLED TO A TRANSCRIPT OF HIS TRIAL AT STATE EXPENSE FOR THE PURPOSE OF PREPARING A PETITION FOR A WRIT OF HABEAS CORPUS.

The District Court's order presents a narrow but nevertheless extremely significant issue. This issue is framed by the following circumstances: (1) appellee's conviction was affirmed on appeal by the California Court of Appeal; (2) appellee was represented by counsel on that appeal and his appellate counsel had access to and in fact used a copy of the complete record of the proceedings at trial; (3) appellee's petition to the District

Court contained no allegation of any error committed at his trial, nor any allegation of illegality in his sentencing, nor any allegation that error was committed on his appeal; (4) appellee has never instituted any proceeding in any court which collaterally attacks the validity of his conviction; (5) appellee has neither demonstrated nor even alleged a need for the transcript other than his desire to go on a fishing expedition in search of a flaw in his trial record.

It is important to state what is not at issue in this case. Appellee's desire for the transcript is not related to any pending action in any court. An indigent's right to a free transcript in connection with a direct attack on his conviction by way of appeal is not here at issue as it was in Griffin v. Illinois, 351 U.S. 12 (1956). Similarly, an indigent's right to a free transcript to be used on appeal from a denial of relief by way of collateral attack on a judgment of conviction is not here involved as it was in Long v. District Court, 385 U.S. 192 (1966) (appeal from unsuccessful post-convictio relief proceedings), and in Lane v. Brown, 372 U.S. 477 (1963) (appeal from denial of petition for writ of coram nobis).

The District Court principally relied on the above cases and determined that their logic compelled a finding

that an indigent prisoner is entitled to a free transcript to prepare a petition for a writ of habeas corpus in the same manner as he is entitled to a transcript to prepare an appeal. Of course, the need of a trial transcript in connection with a collateral attack is quite different from the need of it in connection with an appeal or direct attack. As the court said in United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964):

> "The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript. He may well have a need of a transcript or a partial transcript to support some ground of collateral attack, but rarely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack." 341 F.2d at 835 (emphasis added).

In its order, the District Court stated:

> "Respondent and the State of California have taken the position that petitioner has

> shown no good cause for his request [for a free transcript]. There are two answers to this. First, he alleges that there were errors in his conviction, and second, it may not be possible to pinpoint such alleged errors in the absence of a transcript." (CT 54).

With all due respect to the District Court, appellant respectfully urges that appellee's petition alleged no error in his conviction. Appellee contended that his incarceration is unlawful on the sole ground that the State of California has denied him due process and equal protection of the law "by the illegal retainment of my trial records." (CT 4). The instant petition is not similar to that before the court in United States v. Glass, 317 F.2d 200 (4th Cir. 1963), where, although Glass had merely asked the federal court to provide him a free trial transcript, his specific and detailed allegations of fact stated a prima facie case for relief under Title 28, United States Code section 2255, and for that reason justified treating his moving papers as such a motion rather than one merely for a free transcript. Appellee's petition contains no such allegations.

We have then a state prisoner who has commenced no proceeding to collaterally attack his judgment of

conviction and who has made no allegation of any sort that that conviction is in any way invalid. The question before this Court is whether such a person is, as a matter of federal constitutional law, entitled to a free transcript of his trial on demand and at state expense.

There is no issue in this appeal under the equal protection clause of the Fourteenth Amendment because California law has not been discriminatorily applied to appellee. It is true, as alleged in appellee's petition to the District Court, that California law provides that one who is convicted of a crime is entitled to a free transcript of his trial proceedings for purposes of his appeal. California Rules of Court, Rule 35(c); People v. Smith, 34 Cal.2d 449 (1949). However, this does not necessarily mean that every appellant in a California criminal case is entitled, as a matter of California law, to a free trial transcript for his individual and permanent retention. Thus, where there are two or more appealing defendants in a case where a judgment of death has not been rendered against any of the defendants one copy is prepared for them to share for purposes of their appeal. California Rules of Court, Rule 35(c) and 10(c). Upon termination of such an appeal involving multiple appellants, there is no provision in California law regarding which appellant is entitled to permanent retention of

the single copy of the trial record. This is relevant to the instant case where appellee was convicted together with a codefendant and the codefendant is the one who received and retained appellants' copy (CT 12, 21). Nevertheless, as was noted above, Mr. Wade's appellate counsel had access to and in fact used a copy of the complete record of the trial proceedings.

It is clear that appellee is not entitled to a free transcript of his trial proceedings to be used for no other purpose than to go on a fishing expedition in search of a flaw which may constitute grounds for collateral attack on his judgment of conviction. This point is implicit in the opinions of the United States Supreme Court and has been expressly stated by a majority of the Courts of Appeals. Thus, in Griffin v. Illinois, supra, the court said: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it." 351 U.S. at 20. In Eskridge v. Washington State Board, 357 U.S. 214 (1958), a case similar to the Griffin case, the court said: "We do not hold that a state must furnish a transcript in every case involving an indigent defendant." 357 U.S. at 216. In Burns v. Ohio, 360 U.S. 252 (1959), the Supreme Court's position is made more clear. There, the court cited with approval an Illinois Supreme

Court rule, promulgated as a result of Griffin, which provided for an indigent to receive a free transcript where "necessary to present fully the errors recited in the petition. . . ." 360 U.S. at 258 n.11.

The Courts of Appeals have been specific in their holdings with regard to this issue. In Ketcherside v. United States, 317 F.2d 807 (6th Cir. 1963), the court reviewed the District Court's denial of a federal prisoner's request for a free transcript of his trial to be used for the purpose of preparing his briefs and arguments on a motion to vacate his sentence. In affirming the District Court's decision, the Court of Appeals held that the law does not entitle "a federal prisoner to obtain such a transcript at government expense for the purpose of preparing a case pursuant to 28 U.S.C.A. § 2255. [Citations]." 317 F.2d at 808 (emphasis by the court). Similarly, in Culbert v. United States, 325 F.2d 920 (8th Cir. 1964), the court affirmed the District Court's denial of a federal prisoner's request for a free transcript of his trial where the prisoner had not taken an appeal from his conviction, had commenced no other proceedings except the one then before the court, and made only extremely vague allegations that his conviction was invalid. In affirming the denial of the request for a free transcript the Court of Appeals for the Eighth Circuit said:

"We have carefully examined all the files, papers and records from the inception of the criminal charges, and we are satisfied that appellant is on a fishing expedition -- he desires a transcript at Government expense with some vague hope of discovering a flaw in the proceedings which would entitle him to make collateral attack upon the judgment. There is no merit in this claim and the order appealed from is affirmed." 325 F.2d at 922.

In Harless v. United States, 329 F.2d 397 (5th Cir. 1954), the court dismissed as frivolous a federal prisoner's appeal from the District Court's denial of his request for records. Harless had made extremely vague allegations with regard to error committed at trial and requested the District Court to order that he be granted free records of the trial proceedings in order to "ascertain the correctness of his beliefs." The Court of Appeals for the Fifth Circuit quoted at length from the opinion in Ketcherside v. United States, supra, and then held that the right to proceed in forma pauperis does not include the right to free records for use in proposed or prospective litigation and that the request for free records was also insufficient for its failure to state with any

particularity or color of merit why the judgment of conviction was allegedly illegal. Harless v. United States, supra, at 398-399. In United States v. Glass, discussed above, it is significant to note that although the Court of Appeals for the Fourth Circuit felt Glass had stated a prima facie case for relief under Title 28, United States Code section 2255, he nevertheless had failed to justify an order providing him a free transcript because his allegations did not snow a need for the same. United States v. Glass, supra, at 202.

In both the Glass and the Shoaf cases, the Fourth Circuit Court of Appeals considered the instant problem expressly in the light of the Griffin case and the subsequent Supreme Court cases developing the principles of Griffin, including Lane v. Brown, supra, Smith v. Bennett, 365 U.S. 708 (1961), and Burns v. Ohio, supra. United States v. Glass, supra, at 202-203 n.5; United States v. Shoaf, supra, at 834 n.2.

Subsequently, in a case involving the request by a state prisoner for a free trial transcript this Court stated:

> "Nor is the court required to order a copy of appellant's trial transcript merely to enable appellant to 'comb the record in the hope of discovering some flaw.'" McGarry v. Fogliani,

370 F.2d 42, 44 n.7 (9th Cir. 1966).
This Court there cited with approval the opinion of the Fourth Circuit Court of Appeals in United States v. Glass, supra.

In light of the above cases, it is apparent that both the overwhelming weight and the logic of the authorities who have considered the problem compel a result contrary to that reached by the District Court in the instant case.

CONCLUSION

The practical effect of the District Court's order is to require the state to furnish, on demand, each state prisoner a full record of the proceedings which led to his being in state custody so that he may comb such records for the purpose of discovering some flaw which may furnish grounds for collateral attack on a presumptively valid judgment of conviction. This would be so regardless of whether the prisoner has alleged or demonstrated any specific need for such records and regardless of whether he has commenced or attempted to commence any court action collaterally attacking his conviction.

Contrary to the District Court's statement in its order in the instant case the logic of the holdings of the United States Supreme Court and the specific holdings of the various Courts of Appeals noted above are affirmative

authority for a result opposite from that reached by the District Court.

For the aforementioned reasons the District Court's order should be reversed.

DATED: September 5, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General

Attorneys for Appellant.

CO
CR SF
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

September 5, 1967

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General
of the State of California